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No. 1155

In The Supreme Court of The United States

OCTOBER TERM 1967

STATE STREET BANK AND TRUST COMPANY,
Petitioner

v.

BANCO ESPANOL DE CREDITO,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

BANCO ESPANOL DE CREDITO,
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State Street Bank and Trust Company prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit, entered on November 7 and November 29, 1967, in the two cases between the parties indicated above.

OPINIONS BELOW

This petition relates to two cases brought in the United States District Court for the District of Massachusetts and there consolidated. The opinion of the District Court (R. 70-76) is reported at 266 F. Supp. 106 and is appended hereto as Appendix A at page 21. The appeals were consolidated in the Court of Appeals for the First Circuit, whose opinion (R. 173-187) is reported at 385 F. 2d 230 and is appended hereto, together with the judgments sought to be reviewed, as Appendix B at page 27.

JURISDICTION

The judgment of the Court of Appeals in each case was dated and entered November 7, 1967 (R. 188). That Court denied a timely petition for rehearing in both cases (R. 188-205) by a judgment dated and entered on November 29, 1967 (R. 206). This Court has jurisdiction to review those judgments under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does a bank that issues an irrevocable documentary letter of credit have the right to require that documents presented to it to obtain payment under that letter of credit comply with the terms of that letter of credit?

2. May one who presents documents for payment under a letter of credit to the bank that issued the letter of credit impeach the issuer's rejection of the documents for non-compliance with the letter of credit, by evidence of the issuer's relations with its customer and with others and of the customer's transactions with the beneficiary of the credit and with others?

3. May a court reviewing the rejection of documents by the issuer of a letter of credit overrule the issuer's rejection of the documents for non-compliance with the letter of credit, on the basis of evidence regarding the issuer's relations with its customer and with others and of the customer's relations with the beneficiary of the credit and with others?

4. Does an inspection certificate that does not certify that goods conform to the order, that contains critical ambiguities, that states that it is "under reserves", that is inordinately long, complicated and ungrammatical, and that states a term of the order while showing on its face that the term was not satisfied, comply with a letter of

credit calling for an inspection certificate "certifying that the goods are in conformity with the order"?[1]

5. May an intermediary bank that gave credit for drafts drawn under a letter of credit, on presentation to it of documents that did not comply with the terms of the letter of credit, pass the burden of its mistake on to the bank that issued the letter of credit?

STATUTES INVOLVED

This case involves certain sections of the Letter of Credit Article of the Uniform Commercial Code, as adopted in Massachusetts. Massachusetts General Laws, c. 106, §§ 5-109, 5-112, 5-114. The pertinent portions of these sections are set forth in Appendix C at page 43.

STATEMENT OF THE CASE

In each of these two cases the respondent Banco Espanol de Credito sought to recover upon a draft drawn under one of two similar letters of credit issued by the petitioner State Street Bank and Trust Company, the defendant below. The jurisdiction of the District Court rested on diversity of citizenship under 28 U.S.C. § 1332(a)(2), the plaintiff being a Spanish corporation and the defendant being a Massachusetts corporation (R. 13, 16, 24, 27). In each case the plaintiff, a Spanish bank, had credited a customer for the amount of a draft after examining and accepting the accompanying documents (R. 44, 46, 53). In each case the plaintiff had then presented the draft to the defendant, which rejected both drafts on the ground that one of the required

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[1] This question is necessarily presented by these cases on their merits although, being limited to specific and unusual documents, it is not of itself important enough to support this petition.

accompanying documents, an inspection certificate, did not comply with a term of the respective letter of credit as amended (R. 111). That term, identical in each letter of credit, called for an "inspection certificate . . . certifying that the goods are in conformity with the order." In No. 6938 in the Court of Appeals, No. 64-448-F in the District Court, the draft (R. 99) was in the amount of $96,394.96. In No. 6939 in the Court of Appeals, No. 64-569-F in the District Court, the draft (R. 139) was in the amount of $11,032.40.

An understanding of the events that led to these two actions requires a brief view of the mechanics and terminology of letters of credit. An "irrevocable documentary" or "commercial" letter of credit is an absolute undertaking to make payment upon the occurrence of events it describes. As widely used to finance international commerce, the undertaking is made by a major commercial bank in the country of a party intending to buy goods. The prospective purchaser is called the "customer", the bank is called the "issuer", and the prospective foreign manufacturer or seller of the goods is called the "beneficiary".[2]

The letter of credit that the issuer prepares at the customer's request does not describe the customer's purchase or contract. It describes only certain other documents the presentation of which will require the issuer to make payment. When the issuer issues or gives notice of the letter of credit it incurs an absolute obligation to make payment

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[2] See Mass. G.L. c. 106, § 5-103 (1)(*c*): "An 'issuer' is a bank or other person issuing a credit." (*d*): "A 'beneficiary' of a credit is a person who is entitled under its terms to draw or demand payment." (*g*): "A 'customer' is a buyer or other person who causes an issuer to issue a credit." In these definitions as in the balance of Article 5 the Uniform Commercial Code followed with little or no change the well established rules universally applied to commercial letters of credit.

if the "presenter,"[3] whether the beneficiary or another, presents precisely those documents; that obligation ripens when but only when the presenter does present such documents. The issuer upon presentation of documents under a letter of credit has a duty quickly and correctly to determine whether the documents do in fact strictly comply with the credit. If the documents comply but the issuer does not make payment the issuer is liable to the presenter. If the documents do not comply but the issuer does make payment the issuer is liable to the customer and cannot obtain reimbursement from the customer.[4] The issuer has no concern whatever with the performance of the underlying sales contract or with the relations of the parties thereto or of others.

Until the decision of the Court of Appeals in these two cases, it was understood throughout the commercial and banking world that the issuer of such a letter of credit is solely a "dealer in documents". Its right and its duty are only to compare the face of the documents presented to it with the language of the letter of credit, and to pay or refuse to pay on that basis alone. Its risk is only that of making a mistake in its examination of documents. The

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[3] See Mass. G.L. c. 106, § 5-112(3): "'Presenter' means any person presenting a draft . . . for honor under a credit. . . ." In the absence of fraud it makes no difference whether the presenter is the beneficiary or an advising or confirming bank or a holder in due course or anything else. See Mass. G.L. c. 106, § 5-114; Miller, "Problems & Patterns of the Letter of Credit", 1959 U. Ill. L.F. 162, 181.

[4] The only exceptions to these rules arise where the documents although apparently regular are forged or fraudulent, see Mass. G.L. c. 106 § 5-114 (2) (although this issue was raised in the District Court [R. 25-32] it has not been passed on and is not relevant to this petition); where the customer waives the defects in the documents, which of course it is under no obligation to do; and where the customer has executed a special agreement to indemnify the issuer regardless of the non-conformity of the documents.

only compensation to the issuer for so financing often large and complex transactions is a commission "calculated in low fractions of 1 per cent." Ward & Harfield, *Bank Credits & Acceptances* 37 (4th ed. 1958).

The transactions which led to the present litigation initially followed the model sketched above. In November 1962 a clothing concern named Robert Lawrence, Inc., a customer of the petitioner State Street Bank and Trust Company, came to the petitioner to have it issue letters of credit to finance purchases by Lawrence of clothing to be made by two Spanish beneficiaries of the credits (R. 70). Each letter of credit as amended provided for payment of drafts which were required to be accompanied by certain specified documents, such as described types of invoices and bills of lading, "evidencing shipment of orders Nos. 101, 102 and 103" in one case and "No. 100" in the other case (R. 81, 135). In addition each letter of credit called for an "inspection certificate . . . issued by Supervigilancia Sociedad General de Control, S.A., Barcelona, certifying that the goods are in conformity with the order" (R. 84, 137). Neither credit further identified the orders or stated in any detail their terms. Neither credit required that the inspection certificate refer to conformity with a sample of the clothing. Both beneficiaries were notified of the credits through their bank, the respondent (R. 81, 135).[5]

In March 1963 the two Spanish beneficiaries presented their respective drafts and supporting documents to the respondent (R. 43, 164, 165). In each case one of the

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[5] The respondent was thus an "advising bank" but not a "confirming bank". See Mass. G.L. c. 106, § 5-103(1)(*e*): "An 'advising bank' is a bank which gives notification of the issuance of a credit by another bank." (*f*): "A 'confirming bank' is a bank which engages either that it will itself honor a credit already issued by another bank or that such a credit will be honored by the issuer or a third bank."

documents purported to be an inspection certificate from "Supervigilancia", which read in pertinent part as follows:

> "WE HEREBY CERTIFY: . . . That we have effected the inspection and ascertainment of the merchandise, basing ourselves on the details shown on the order[s][6] *or* Stock-sheet[s] No[s]. [100] 101, 102 and 103 . . . and in the *samples* that were handed to us by the Requirer, that *corresponded; according to his sayings* ratified in the presence of a Public Notary, to the *samples* seen and approved by the Delegate of Firm ROBERT LAWRENCE INC, during his stay in Barcelona, and with are mentioned in the notes appearing in order[s] Stock-sheet[s] No[s]. [100] 101, 102, and 103 where there is a note reading:
>
> 'COATS or JACQUETS [Germents] TO BE AS SAMPLE INSPECTED IN SPAIN'
>
> owing that at time of *being required* to carry out the inspection, *we had no more indications* than those shown on aforesaid Bank credit . . . the whole, at the moment of the inspection, being found conforming to the *conditions estipulated* on the *Order-Stock-sheet*[s]. . . .
>
> We have to point out[7] . . . that the Requirer having loaded the merchandise and being already in his possession the bills of landing together with the further documents necessary to be delivered to the Bank, holder of the aforesaid Bank-credit, he is formally *requiring us* for delivering this certificate what we are doing today *under reserves,* not as far as the goods are concerned, which *correspond to the samples* seen and produced referred to at the beginning of this certificate, but to the existing differents [difference] between both interested

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[6] Brackets in this quotation indicate differences between the two certificates.

[7] At this point each certificate quoted numerous cables between "Supervigilancia" and Robert Lawrence, Inc., and paraphrased statements and explanations made by unidentified representatives of the Spanish manufacturers.

parties as per the quoted cables. The whole is stated thereby, understanding that *we reject whichever responsibility* that from it might arise . . . we repeat *without our being in a position to assume responsibility for contractual differences* that may exist between Vendors and Buyers." (R. 107-109, 145-147.) (Emphasis added.) [8]

Responsible officials of the respondent examined the documents, including these purported inspection certificates, endorsed the drafts, extended "irrevocable" credits to the beneficiaries, and sent the drafts and the documents to the defendant for payment (R. 42, 44, 46, 50, 52-53, 71).

Between April 1, 1963, when it received the drafts and documents, and April 3, the petitioner's executive officers examined the documents (R. 59, 62-63), sought the advice of counsel (R. 63), decided that the certificates did not comply with the letters of credit (R. 62-63, 69, 75), asked its customer whether it desired to waive the defects in the certificates (R. 75, 111), and notified the plaintiff that the documents were not satisfactory and that the State Street Bank was rejecting them (R. 111). Thereafter the petitioner received an "addendum" to each certificate which asked it to ignore certain portions of the certificates on the ground "that since this Superintending Service was *unaware of the clauses and contractural terms* from which the aforesaid Letter of Credit is derivating, to *decline the responsibility* that might be attributed to us for keeping silence. . . ." (R. 133, 148.) (Emphasis added.)[9] The petitioner informed the respondent that these addenda did not alter its position and did not comply with the respective letters of credit (R. 121, 152).

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[8] One of these purported certificates is reproduced in full (reduced in size) as Appendix D hereto at p. 45.

[9] One of these addenda is reproduced in full (reduced in size) as Appendix E hereto at p. 48.

Banco Espanol subsequently brought these two actions. The State Street Bank's first defense in each case was that the inspection certificates did not comply with the letters of credit (R. 24-29). There was a trial without a jury, at which the plaintiff, over the defendant's repeated objection (R. 35, 36, 44, 46, 55, 61), offered testimony (R. 66-68, 157-163) and documents regarding the relations between the State Street Bank and its customer, Robert Lawrence, Inc.;[10] regarding the relations between Lawrence and the Spanish manufacturers;[11] and regarding relations with Supervigilancia, the inspection agency.[12] Judge Ford subsequently wrote an opinion (Appendix A) (R. 70-76) analyzing the language of the inspection certificates and the addenda and deciding that they had not complied with the letters of credit. For this reason he concluded that the "defendant bank was justified in its refusal to accept" the inspection certificates (p. 26, *infra*) and dismissed both complaints.

The Court of Appeals in its opinion (Appendix B) (R. 173-187) analyzed, so far as it could from the record before it and without benefit of pertinent findings by the District Court, the history of the relations among all the parties to the underlying sales contracts and to the several disputes relating thereto, and the position and probable state of mind at various times of the plaintiff bank, of Robert Lawrence, Inc., and of Supervigilancia, which probably led to the various actions they took. On the assump-

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[10] *E.g.*, Ex. 3, R. 89; Ex. 6, R. 111; Ex. 7, R. 112-113; Ex. 9, R. 117; Ex. 11, R. 125-126, 128-131; Ex. 14, R. 151-153.

[11] *E.g.*, Ex. 3, R. 90-98.

[12] *E.g.*, R. 162-163. Most of the evidence regarding relations with Supervigilancia came from the cables quoted in the inspection certificates.

tion that it was necessary to seek "reasonable flexibility as to ancillary matters" (p. 34, *infra*) the Court analyzed in minute detail a variety of documents and letters that the defendant had never seen, in order to identify various original and superseding orders (pp. 30-31, *infra*). It found from similar evidence various equities running against Lawrence as the one that "structured" the procedure to be followed, ran certain risks, and "had long since sown the seeds of dispute" (pp. 35-37, *infra*). In analyzing this array of extrinsic evidence it construed "strongly against the issuer" language used by other parties but not by the issuer (p. 40, *infra*).[13] It discussed not whether the issuer was liable for refusing to pay but whether the plaintiff, the "advising bank" or "negotiating bank", was "justified in paying" (pp. 39-41, *infra*). It concluded that it was the Court's function to prevent or undo a situation in which "a buyer could frustrate an international transaction on the eve of fulfillment" (p. 40, *infra*). It rejected all the cases holding that the issuer's duty is strictly to compare the documents with the letter of credit, as relating only to "the nomenclature of goods" (p. 35, *infra*). On this reasoning the Court of Appeals vacated the judgment of the District Court and remanded the cases for further proceedings of limited scope which are not involved in this

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[13] For this principle and others the Court relied on *Fair Pavilions, Inc.* v. *First Nat'l City Bank*, 264 N.Y.S. 2d 255 (App. Div. 1965), which has been reversed. 19 N.Y. 2d 512, 281 N.Y.S. 2d 23, 227 N.E. 2d 839 (1967). The words which the Court construed "against the issuer" were (1) "correspond", as in "samples . . . that corresponded . . . to the samples seen and approved by . . . Lawrence", which appear only in the inspection certificates, and (2) "sample approved in Spain", as in "Jacquets [Germents] to be as sample inspected in Spain", which appear in Lawrence's "stock-sheets" sent to the manufacturer, and are quoted in the inspection certificates. None of this language appears in either letter of credit.

petition.[14] It subsequently denied the timely petition of the defendant for rehearing. This petition for certiorari is directed to these judgments of the Court of Appeals for the First Circuit.

REASONS FOR GRANTING THE WRIT

Although the law involved in this case is rather technical and relatively infrequently litigated, this case is of great importance. United States imports annually exceed twenty-five billion dollars.[15] A very substantial portion of these imports, and particularly of those in non-governmental transactions, is financed by letters of credit.[16] This method of third-party financing of international transactions is the most generally accepted and understood non-governmental

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[14] These proceedings would relate only to additional defenses not reached by the District Court because in effect it sustained the defendant's first defense.

[15] United States imports in 1966, not including imports by the armed forces for their own use, exceeded 25.3 billion dollars. Imports from Western Europe alone reached 7.6 billion dollars. Imports just from Spain reached $157,328,261. Imports of clothing alone from Spain reached $6,083,381; from Western Europe $210,048,278; from the world nearly 600 million dollars. U. S. Bureau of the Census, "U. S. Imports of Merchandise for Consumption, Report FT 125, December 1966." United States imports for 1967 are reported to have exceeded 26.8 billion dollars.

[16] No figures are compiled on United States letter-of-credit transactions by any agency. The Federal Reserve Bank in Boston has given an oral estimate in excess of two billion dollars a year, and petitioner's own estimate for Boston banks is 300 million dollars a year. Petitioner alone issues about 1500-2000 letters of credit a year (R. 57). Respondent apparently handles more than ten times this number ("70, 80, 90 per day") (R. 48). As of 1950 "about ninety per cent of such financing [of international commercial transactions in world trade] is made by letters of credit." Note, 65 Harv. L. Rev. 1420 n. 2. (1952).

one in existence.[17] It provides a simple and reliable independent guarantee of payment at a very nearly nominal cost. This combination of ease, cheapness and reliability is essential to its acceptance and effectiveness. Here even more than in most "mercantile transactions the great object should be certainty" of the law. See *Vallejo* v. *Wheeler*, 1 Cowp. 143, 153, 98 Eng. Rep. 1012, 1017 (1774) (Mansfield, L. J.).

The decision of the Court of Appeals in these cases does not merely touch lightly or tangentially upon these essential characteristics of letters of credit. The Court of Appeals ignored or misunderstood the fundamental principle evolved, elaborated and confirmed over more than a century of litigation, reflected in numerous texts and in statutes and international private agreements, and widely understood and accepted by banks and their counsel and by importers and exporters and their counsel in the United States and throughout the world. This principle, which is the foundation of the essential advantages of letters of credit, is that the issuer of a commercial documentary letter of credit is solely a dealer in documents and must look only to the face of the documents presented for payment and the face of the letter of credit. If it refuses to make payment, for whatever reason, when the documents comply with the credit, it is liable to the presenter. If it makes payment, for whatever reason, when the documents do not comply, it is liable to the customer and loses its right to be reimbursed by the customer.[18]

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[17] "Since the first World War, the commercial documentary credit has emerged as the most satisfactory method of financing international trade transactions." *Id.* at 1420. It is also used extensively to finance domestic trade.

[18] See note 4, *supra*.

This is the principle reflected in the Uniform Commercial Code, Mass. G.L. c. 106, § 5-109(2):

> "An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit";

and § 5-114(1):

> "An issuer must honor a draft . . . which complies with the terms of the relevant credit."[19]

This is the principle reflected in the "Uniform Customs and Practice for Commercial Documentary Credits" of the International Chamber of Commerce (R. 167, Plaintiff's Ex. 19), Article 1:

> "Commercial documentary credits are essentially distinct transactions from sales contracts, on which they may be based, with which Banks are not concerned";

Article 9:

> "Banks must examine all documents and papers with care so as to ascertain that on their face they appear to be in order";

and Article 10:

> "In documentary credit operations, all parties concerned deal in documents and not in goods. . . . If documents, on their face, are not as stipulated by the terms and conditions of the credit, the issuing Bank must, upon receipt of the documents, determine on the basis of the documents alone, whether" to reject them.[20]

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[19] See also § 5-109, Uniform Laws Comment 2: "Subsection (2) states the basic obligation of the issuer to examine with care the documents required under the credit. . . . The purpose of the examination is to determine whether the documents appear regular on their face."

[20] See also Article 5: "Irrevocable credits . . . constitute an engagement of that Bank . . . that the provisions for payment . . . will be duly fulfilled provided that the documents . . . comply with the terms and conditions of the credit." This strictly documentary requirement is "the most important aspect of the Customs . . . consistent with the usual approach of courts and commentators." Note, 65 Harv. L. Rev. 1420, 1422-23 (1952).

This is the principle established with near unanimity in the cases, regardless of the particular details of the controversy being litigated.[21] (One of the most common statements, that documents submitted for payment under letters of credit must be strictly construed,[22] would be meaningless

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[21] *E.g., Decker Steel Co.* v. *Exchange Nat'l Bank,* 330 F. 2d 82, 87 (7th Cir. 1964) ("To impose on banks a duty to look beyond the documents required by the letter of credit and the conditions specified therein would not only unduly burden traditional banking operations but would seriously hamper the conduct of business in general."); *Fair Pavilions, Inc.* v. *First Nat'l City Bank,* 19 N.Y. 2d 512, 516-17, 281 N.Y.S. 2d 23, 227 N.E. 2d 839 (1967) ("An issuing bank is required to pay or is exonerated from paying on a letter of credit according to whether the documents presented to it conform to what is required by the letter. . . . The documents themselves which are before the issuing bank must be sufficient, on their face, to authorize the action taken by the bank."); *Moss* v. *Old Colony Trust Co.* 246 Mass. 139, 152, 140 N.E. 803 (1923) ("There is no promise to pay unless drafts are in strict conformity to the authority conferred" by the letter of credit.); *Continental Nat'l Bank* v. *National City Bank,* 69 F. 2d 312, 315 (9th Cir. 1934) ("[I]t is well established that, if the documents are not in accordance with the specifications of the letter of credit, the bank of issue is justified in refusing to honor the draft."); *National City Bank* v. *Seattle Nat'l Bank,* 121 Wash. 476, 209 Pac. 705, 30 A.L.R. 347 (1922) ("Bankers are not dealers in sugar in such a case as this, but are dealers in documents only, and whatever contract was made by the banks must be determined from the letter of credit itself. . . . The banker knows only the letter of credit, which is his only authority to act, and the documents which are presented under it. If these documents conform to the terms of the letter of credit he is bound to pay. If not, he is equally bound not to pay."); *J. H. Rayner & Co.* v. *Hambro's Bank Ltd.* [1943] 1 K.B. 37, 40 (Court of Appeal) ("It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honor drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit."); *Dulien Steel Prods. Inc.* v. *Bankers Trust Co.* 298 F. 2d 836, 840-41 (2d Cir. 1962) (Marshall, J.).

[22] *E.g., Equitable Trust Co.* v. *Dawson Partners, Ltd.* [1927] Ll. L. Rep. 49, 52 ("There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank . . . cannot take

if extrinsic evidence like that relied on by the Court of Appeals had any relevance.) This is the principle flatly stated in texts and articles too common and undisputed to cite.[23]

The Court of Appeals neither acknowledged nor heeded this principle underlying all commercial letter-of-credit transactions. Throughout its statement of the case and its discussion the Court continually violated it. What was said of the opinion above at pp. 9-10 will not be repeated. From its introductory reference to "preliminary arrangements apparently worked out by an intermediary" (p. 28, *infra*) to its concluding reference to how "Supervigilancia

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upon itself to decide what will do well enough and what will not.");
Wells Fargo Nat'l Bank v. *Corn Exchange Nat'l Bank*, 23 F. 2d 1 (7th Cir. 1927); *Banco Nacional Ultramarino* v. *First Nat'l Bank*, 289 Fed. 169, 175 (D. Mass. 1923). "[T]he strict and literal standard of compliance is rightly the general principle of documentary compliance. It is the only principle which . . . serves the general interests of the banking and mercantile communities." Kozolchyk, *Commercial Letters of Credit in the Americas* § 13.02 (1966). The "strictest compliance" of the documents to the letter of credit is required. McCurdy, "Commercial Letters of Credit", 35 Harv. L. Rev. 539, 715, 730 (1922).

[23] For recent statements see Miller, "Problems & Patterns of the Letter of Credit", 1959 U. Ill. L. F. 162, 169: "The operation of the credit itself is completely separated from the actual sales transaction. The mechanics of the letter of credit arrangement are based upon documents and documents alone; the parties concerned deal exclusively in them and the rights, liabilities, and interests with respect to the proceeds of the credit are determined solely by reference to them." Mentschikoff, "Letters of Credit," *American Bar Ass'n Uniform Commercial Code Handbook* 153, 157 (1964): "Basically, the issuer of the letter of credit is responsible only for examining with care to make sure the pieces of paper which are called for by the letter of credit—not by the sales contract—are in fact forthcoming." Funk, "Letters of Credit", 83 Banking L.J. 1, 8 (1966): "After the bank has examined the documents it must make a decision as to whether or not they appear on their face to comply with the terms of the credit. If they do, the bank is bound to honor the draft. . . . If the documents do not comply, then the issuing bank must dishonor the draft."

acted solomonically" and could not "have done otherwise" (pp. 40-41, *infra*), the opinion second-guesses the defendant's decision, which was based solely on an examination of the documents before it and on advice of counsel given on the same basis. The opinion does this second-guessing primarily on the vague and irrelevant ground of "flexibility"[24] and by reference to and inferences drawn from conversations, correspondence, cables, "stock sheets" and "orders" between the defendant and Lawrence, Lawrence and the beneficiaries, Lawrence and Supervigilancia, and various "representatives".[25] The de-

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[24] But despite the need to "facilitate the movement of goods . . . a bank cannot afford and is not equipped to determine in any given case whether the discrepancy is or is not one which affects the bargain between the parties. It is . . . essential that the bank look only to the letter of credit and not to the sales contract." Ward & Harfield, *Bank Credits & Acceptances* 84-85 (4th ed. 1958). Even if the Court of Appeals were correct in its theories of policy, the equities involving Robert Lawrence, Inc., or any buyer, cannot be applied in litigation to which neither it nor the seller is a party and which only involves "the financing, paper-handling, and payment phases of the transaction." See Comment, 8 Harv. Int'l L. J. 116, 129 (1967).

[25] A prime example of this second-guessing is the opinion's extended effort to identify given pieces of paper with given order numbers (see Appendix B, pp. 30-31, *infra*)—a job the letter of credit assigned to Supervigilancia and one the State Street Bank never attempted to perform—on the basis of evidence that was never in the bank's possession and that the bank could not itself have used to make or justify its decision. See *Maurice O'Meara Co.* v. *National Park Bank*, 239 N.Y. 386, 146 N.E. 636 (1925); *American Steel Co.* v. *Irving Nat'l Bank*, 266 Fed. 41, 43 (2d Cir. 1920), *cert. denied* 258 U.S. 617 (1922); *Bank Melli Iran* v. *Barclays Bank*, [1951] 2 T.L.R. 1057, 1061 (K.B.); Miller, "Problems and Patterns of the Letter of Credit," 1959 U. Ill. L.F. 162, 169. It should also be noted that only the plaintiff introduced or had occasion to introduce evidence of this kind: the defendant did not try the case on any such theory and Lawrence was not a party to these actions. And even the plaintiff did not ask the Court of Appeals to try to legislate *ab initio* in these cases, but agreed that "the banks are concerned only with the letter and the documents." (Brief for Appellant, p. 13.) (See also R. 42-43, 53-54.)

fendant knew nothing of much of this material and was under an obligation, according to well settled law, to ignore all of it. But the opinion necessarily rests on and indeed asserts the proposition that the issuing bank must somehow take into consideration all that the Court of Appeals considered and must reach a conclusion resting on equities arising from the total transaction of which the letter of credit is but a limited and separable part.[26]

Thus the opinion and the decision of the Court of Appeals in these two cases is in conflict in fundamental principle with all the statutory, judicial and other authorities cited above, including decisions of the Supreme Judicial Court of Massachusetts, of the New York Court of Appeals, of other federal Courts of Appeals and of England.[27] This

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[26] How small a part of the whole transaction the letter of credit is, is indicated by how much this litigation, however resolved, leaves unsettled. If the State Street Bank loses here Lawrence is still free to deny it reimbursement, as far as letter-of-credit law is concerned, and the courts of Massachusetts are not bound by the Court of Appeals' judgment of the equities involved in the present case. Moreover Lawrence is still free to sue the Spanish manufacturers for breach of the sales contracts and also to sue Supervigilancia. If the State Street Bank prevails, the Spanish manufacturers can sue Lawrence for breach of the sales contracts and perhaps Banco Espanol and Supervigilancia could sue it as well. See Davis, *The Law Relating to Commercial Letters of Credit* 81-82 (3d ed. 1963); *O'Meara* v. *National Park Bank*, 239 N.Y. 386, 146 N.E. 636 (1925).

[27] See notes 21, 22 and 25, *supra*. These conflicts are of particular significance in such cases as the present, for "diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated." *Norrington* v. *Wright*, 115 U.S. 188, 206 (1885). "Letters of credit in large numbers for vast sums are used in oversea commercial transactions by people whose laws, language, and customs are often different from those of the people where the letter is issued. The safety of the issuing bank, of the buyer for whose account it is issued, and of the seller . . . require that the terms of the letter shall be sharply defined and strictly complied with in all respects . . . [otherwise] the usefulness of the letter of credit, as one of the greatest aids to world commerce, will be ended." *Wells Fargo Nevada Nat'l Bank* v. *Corn Exchange Nat'l Bank*, 23 F. 2d 1, 2 (7th Cir. 1927).

conflict and its consequences cannot be limited to the facts of these two cases. The vice is not just in the result reached by the Court of Appeals but in its method. If it had merely compared the inspection certificates and addenda on their face with the letters of credit and had somehow found that there was essential conformity, that result would have been wrong.[28] But such a result would only have affected the two present cases. It would not jeopardize other pending and future letter-of-credit transactions and the utility of letters of credit as a chief means of financing private international trade. It would not require banks issuing letters of credit to do the impossible: to become involved in matters outside the documents, and to make decisions not on the documents but on the equities between buyer and seller or the "requirement" of "flexibility" in international transactions, at prohibitive cost, under an unmeetable deadline, at the risk of complex litiga-

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[28] It would be out of place to argue this point at length in this petition, although it is presented by these two cases. It may be observed that such a result would violate not only the principle that documents submitted under letters of credit must be strictly construed, see note 22, *supra*, but also the principle that they must exhibit a "formal and apparent regularity", Kozolchyk, *Commercial Letters of Credit in the Americas* § 13.01 (1966); they must "conform to a reasonable commercial standard. . . . The fact that they have 'to pass current in commerce' means that the customer has the right to expect a document conforming to the customary one." Miller, "Problems & Patterns of the Letter of Credit," 1959 U. Ill. L.F. 162, 184. See also *Hansson* v. *Hormel & Harley, Ltd.* [1922] A.C. 36, 46 (H.L.); Rowland, "Letters of Credit", 30 Mo. L. Rev. 288, 291 (1965); Mass. G.L. c. 106, § 5-109(2) and Uniform Laws Comment. (Note 19, *supra*.) Aside from the manifest peculiarity of the form and language of the certificates and addenda, there was agreement by bankers from both parties that the words "under reserves" mean that the document bearing them is irregular (R. 48-50, 57-58).

tion whichever way they decided and of liability out of all proportion to the undertaking.[29]

The necessary consequence of such a requirement would be to a measurable and perhaps a very substantial extent to impair precisely the values of letter-of-credit financing that make it so heavily used. The ease and simplicity of letters of credit would be nullified if banks before paying or refusing to pay had to evaluate a total relationship-complex and if new and diverse documents had to be prepared to cover a vastly increased range of variables. The cost of letters of credit would be multiplied if banks had to abandon a rather mechanical comparison of relatively simple documents for complex procedures involving executive officers and attorneys. See Ward & Harfield, *Bank Credits & Acceptances* 37 (4th ed. 1958). The reliability of letters of credit would be shaken if good documents could be impeached and bad ones validated by extrinsic and even unwritten evidence, leading to frequent and protracted litigation concerning numerous parties and involving complicated evidence.

But the approach of the Court of Appeals has, if it stands, all these ill effects, and the overriding one of creating uncertainty on the part of buyers, sellers and banks in all their assumptions and common understandings about letters

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[29] These are in part the risks that the parties to the sales contract are not permitted to shift to the issuing bank. See *Dulien Steel Prods. Inc.* v. *Bankers Trust Co.* 189 F. Supp. 922 (S.D.N.Y. 1960), *aff'd* 298 F. 2d 836 (2d Cir. 1962); *Bank of Italy* v. *Merchants Nat'l Bank*, 231 N.Y. 106, 140 N.E. 211 (1923), *cert. denied* 264 U.S. 58 (1924); *Basse & Selve* v. *Bank of Australasia*, 90 L.T. 618, 20 T.L.R. 431 (K.B. 1904); *Midland Bank, Ltd.* v. *Seymour*, [1955] 2 Lloyd's Rep. 147. "The bank was not obliged to assume the burden of determining the accuracy of the representation[s]" made in the documents presented to it. *Fair Pavilions, Inc.* v. *First Nat'l City Bank*, 19 N.Y. 2d 512, 516, 281 N.Y.S. 2d 23, 227 N.E. 2d 839 (1967).

of credit. The relative infrequency of litigation and hence of decisions concerning letters of credit—a highly desirable state of affairs—makes this decision all the more dangerous. It is likely to have an unsettling effect on international trade (and on a substantial amount of domestic trade as well) for an unpleasantly long time unless this Court grants this petition and lays to rest the specter raised by the Court of Appeals.

CONCLUSION

For the reasons presented, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE DISTRICT COURT

OPINION

March 27, 1967

[Civil Actions No. 64-448-F
No. 64-569-F]

FORD, D.J.

These are two actions by Banco Espanol de Credito, a corporation of Spain, against the State Street Bank and Trust Company, a Massachusetts corporation, based upon two irrevocable letters of credit issued by defendant on or about November 15, 1962 at the request of defendant's customer, Robert Lawrence, Inc. for the benefit of certain Spanish manufacturers from whom Lawrence was ordering certain garments. In No. 64-448-F the letter of credit No. 4125 was in the amount of $105,000 (later increased to $151,500) in favor of Manufacturas Alcides S.L. In No. 64-569-F the letter No. 4124 was in the amount of $46,560 in favor of a firm known as Longuer.

The letters as originally issued authorized payment of drafts accompanied by (1) signed invoices, (2) customs invoices, (3) bills of lading to order of defendant and (4) an inspection certificate. By amendments to each letter dated March 1, 1963 and accepted respectively on March 7 and March 12, 1963 it was provided that the inspection certificate should be issued by a Spanish inspection organization, Supervigilancia Sociedad General de Control S.A. "certifying that the goods are in conformity with the order."

The goods were manufactured and shipped; drafts were drawn by the manufacturers (by Alcides in the amount of $96,394.96 and by Longuer in the amount of $11,032.40), and negotiated to plaintiff bank which forwarded them to defendant which received them on April 1, 1963. After examination of the documents defendant on April 3, 1963 notified plaintiff it was rejecting the drafts and refusing payment on the ground that the inspection certificates did not comply with the letters of credit. In each case plaintiff later submitted an addendum to the inspection certificate. Defendant in each case notified plaintiff its position was unchanged and refused to pay the drafts.

The inspection certificates executed by Supervigilancia were lengthy documents. The certificate as to the Alcides goods reads in part:

> "We Hereby Certify: That on March 12th, 1963, and with a view to comply with conditions stipulated in the irrevocable Bank credit no. 4125/35636 opened by the State Street Bank and Trust Company, Boston 1, Mass. USA, the Firm Manufacturas Alcides S.L.—Barcelona, did require us, to carry out the inspection and ascertainment of:
>
> 5,500—Raincoats.
>
> 6,000—Beach Jackets.
>
> destined to the orderer of said credit, Firm Robert Lawrence Inc., Boston, Massachusetts. That we have effected the inspection and ascertainment of the merchandise, basing ourselves on the details shown in the orders or Stocksheets Nos. 101, 102 and 103, dated November 5th, 6th and 13th, November 1962 and in the samples that were handed to us by the Requirer, that corresponded, according to his sayings ratified in presence of a Public Notary, to the samples seen and approved by the Delegate of Firm Robert Lawrence Inc. during his stay in Barcelona, and with are mentioned in the notes appearing in orders Stocksheets Nos. 101, 102 and 103, where there is a note reading:

"COATS OR JACQUETS TO BE AS SAMPLE INSPECTED IN SPAIN"

owing that at time of being required and to carry out the inspection, we had no more indications than those shown on aforesaid Bank credit, which as regards our intervention is textually reading so:.

"INSPECTION CERTIFICATE MUST BE ISSUED BY SUPERVIGILANCIA SOCIEDAD GENERAL DE CONTROL SA BARCELONA CERTIFYING THAT THE GOODS ARE IN CONFORMITY WITH THE ORDER."

The checking of the goods have been carried out on basis of trials, taking at random approximately 10% of the goods ready for this shipment, having obtained the following outturn:

RAINCOATS:	5,500 Mens Cotton Raincoats
Style:	BARCELONA made out in cloth quality ROSAS
"	PALOS made out in cloth quality ECUADOR
"	GRANADA made out in cloth quality ECUADOR
	in Black and Tan Colours
BEACH JACKETS:	6,000 Mens Terry Beach Jackets
Style:	DANSE, one colorway = OLE, one colorway =
	ESCARCHA in yellow, red, blue and

white colors, the whole, at the moment of the inspection, being found conforming to the conditions estipulated on the Order-Stock-sheets. Goods remained packed and ready for shipment as Follows:

Cases marks: CAVENDISH Co./NEW YORK
Raincoats: 60 cases Nos. 81/104 122/126 140/170.
BEACH JACKETS 122 cases Nos. 1/80 105/121 127/139 171/182"

There follows a lengthy recital of the details of a dispute which had apparently arisen between Lawrence and the Spanish manufacturer over the inspection of the goods, as to the merits of which Supervigilancia disclaims any responsibility. It contains the statement:

"Requirer having loaded the merchandise and being already in his possession the bills of landing together with the further documents necessary to be delivered to the Bank, holder of the aforesaid Bank-credit, he is formally requiring us for delivering this certificate what we are doing today under reserves, not as far as the goods are concerned, which correspond to the samples seen and produced referred to at the beginning of this certificate, but to the existing differents between both interested parties as per the quoted cables."

The subsequent addendum to the certificate in substance says that this latter part of the certificate is not to be taken into consideration.

It is the duty of a bank issuing a letter of credit to pay a draft drawn upon it if, and only if, the supporting documents conform to the requirements of the letter of credit. It will be liable to its customer if it makes payment in other circumstances. The bank is not concerned with the underlying contracts or with whether they have been complied with. It deals only in documents and its duty of payment depends solely on their conformity with the letter of credit. It has a duty to examine the documents with care so as to ascertain that on their face they comply with the terms of the credit. These terms must be strictly complied with. Where the language of a document is ambiguous on its face the bank has no duty to determine the real meaning intended. Where a certificate does not use the language required by the letter of credit the bank need not decide whether the language used was meant to say what the letter of credit demanded. Uniform Commercial Code, Mass. G.L. Ch. 106 §§ 5-109 and 5-114;[1] *Moss* v. *Old Colony Trust*

[1] Both parties appear to agree that the case is governed by the Uniform Commercial Code as enacted by Massachusetts. Plaintiff also relies upon the Uniform Customs and Practice for Documentary Credits issued by the International Chamber of Commerce, particularly Article 8 thereof. This, however, in substance states only what is contained in the Uniform Commercial Code.

Co., 246 Mass. 139; *Crocker First National Bank of San Francisco* v. *De Sousa*, 27 F. 2d 462; *Banco Nacional Ultramarino* v. *First National Bank*, 289 F. 169, 175; *Bank of Italy* v. *Merchants National Bank*, 236 N.Y. 106; *J. H. Rayner & Co.* v. *Hambro's Bank, Ltd.* [1943] 1 K.B. 37.

The letters of credit here required an inspection certificate unconditionally certifying "that the goods are in conformity with the order." The certificate in each case fails to meet this requirement. The certificate does not state that the goods conform to the order but only that they are found "conforming to the conditions estipulated on the Order-Stock sheets." This first of all raises a doubt as to whether an "order-stock sheet" may not be a different document from the order. There is no plain statement of conformity to the order as such but only of conformity to "conditions". This leaves it unclear whether the conformity is to the order as a whole or only to certain terms of it. Since the certificate refers specifically to one notation on the order-stock sheets as to conformity to a sample, the certificate is certainly open to the reasonable interpretation that it is intended to assert only that the goods conformed to the sample with which they were compared. That interpretation is supported by the statement in the latter part of the certificate stating that the certificate is given "under reserves, not so far as the goods are concerned, which correspond to the samples seen and produced referred to at the beginning of this certificate . . . "As to the samples used, the certificate carefully restricts itself to a statement that the samples used were those handed to them by a representative of the manufacturer and said by him to be the proper samples.

The certificate whether in its complete original form, or with part of it stricken in accordance with the addendum, is a document carefully drawn to avoid stating unequivocally "that the goods are in conformity with the order."

This is not a situation where through inadvertence or through unfamiliarity with the English language words were used which varied from those required by the letter of credit. The certificate quotes verbatim from the letter of credit the statement of what it was supposed to certify and then deliberately certifies to something different. Clearly this was not the unqualified certificate required by the letter of credit and defendant bank was justified in its refusal to accept it.

Plaintiff argues that defendant should be held liable because in refusing to pay the draft it acted at the request of Lawrence and not in accordance with its own judgment. The court finds on the evidence that the officers of defendant bank arrived at their own independent decision as to the propriety of the inspection certificates. But in any case it was not reprehensible for the bank to consult with its customer. A bank faced with a doubt whether documents submitted meet the requirements of a letter of credit must arrive at a quick decision. If it decides wrongly it may be liable in one case to the presenting bank, in the other to its own customer. Its difficulty may be solved if its customer is willing to waive any defects in the documents and take and pay for the goods. There is nothing wrong in determining whether or not this is the case. Nor was there anything wrong in the bank's accepting an agreement of indemnification from its customer. This may add to the defendant's security but it does not change the essential position of the parties. If defendant were to lose in this action it would normally look to Lawrence for reimbursement. All that the bank has done is to secure its customer's agreement to accept that possible liability.

Judgment will be entered in each action for defendant dismissing the complaint.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 6938.

BANCO ESPANOL DE CREDITO,
PLAINTIFF, APPELLANT,
v.
STATE STREET BANK AND TRUST COMPANY,
DEFENDANT, APPELLEE.

No. 6939.

SAME
v.
SAME

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[266 F. Supp. 106]

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Harold M. Willcox, with whom *Charles C. Cabot, Robert E. Sullivan*, and *Herrick, Smith, Donald, Farley & Ketchum* were on brief, for appellant.

Charles F. Choate, with whom *Mark A. Michelson* and *Choate, Hall & Stewart* were on brief, for appellee.

November 7, 1967.

COFFIN, *Circuit Judge*. This suit began as a claim by appellant, a Spanish bank (Banco Espanol), against appellee, a domestic bank (State Street), for the latter's allegedly

wrongful refusal to accept and pay two drafts drawn upon it pursuant to two irrevocable commercial letters of credit. Each letter was issued by State Street at the behest of its customer, Robert Lawrence, Inc. (Lawrence), a Boston clothing concern. Banco Espanol was designated the advising bank and two Spanish suppliers (Alcides and Longeur) were named as beneficiaries. The cases were consolidated for trial in the district court sitting without a jury and, following judgment for State Street, appellant took these appeals.

The issue is whether State Street, whose letters of credit, as amended, called for the presentation of an inspection certificate by a named firm stipulating "that the goods are in conformity with the order", was justified in refusing to honor the drafts of Banco Espanol on the ground that the inspection certificate did not meet the terms of the letters of credit.

The transaction was initiated by Lawrence to finance the purchase of raincoats, beach jackets, knit shirts, and cardigans from Alcides and Longeur. Based upon preliminary arrangements apparently worked out by an intermediary, of which more later, Lawrence obtained two irrevocable letters of credit from State Street. One letter covered Lawrence orders Nos. 101, 102, and 103 for beach jackets, outer coats and cotton garments in the revised final amount of $105,630, and the other covered Lawrence order No. 100 for wool knit shirts and cardigans in the revised final amount of $13, 320. Both letters constituted Banco Espanol the correspondent bank, and required signed invoices, customs invoices, inspection certificates, and full sets of clean on board ocean bills of lading dated not later than March 31, 1963.

At the time of issuance of the letters of credit, State Street called to the attention of its customer, Lawrence,

that the requirement of an inspection certificate without a named inspector left a hazardous gap in the documents. Lawrence replied that the letters would be later amended to include the name of an inspection agent.

The next three and one half months were significantly devoted to continuing efforts to resolve this problem. On November 22, 1962 one of the Spanish manufacturers (Alcides) wrote Lawrence's representative that it agreed with the idea of naming an inspection agent and suggested that Lawrence put forward a name. Lawrence's man replied shortly that since he would be in Barcelona near the time of delivery, he would be the inspector. Accordingly, State Street sought to amend the letters in January. Foreseeably, this was not acceptable to the beneficiary, as Lawrence learned in early February. Lawrence then wrote State Street (notwithstanding the hiatus in the letters of credit which State Street had noted) that it should not make payment unless inspection certificates were signed by a party acceptable to it. It further agreed to indemnify State Street for any damages resulting from carrying out these instructions, coupling this with a threat to refuse reimbursement if payment were made.

After a meeting between Lawrence and State Street, the object of which was to decide what to do about the inspection issue, a representative of Lawrence went to Spain. This trip resulted in an amendment to the letters of credit, cabled to Alcides on March 1, 1963, which required the inspection certificate to be issued by Supervigilancia Sociedad General de Control S.A. (Supervigilancia) certifying that "the goods are in conformity with the order". While it is not clear on whose initiative this firm was selected, it was apparently well regarded by the State Street official who had been closely associated with this transaction.

Identification of the underlying orders to which the letters of credit referred is not an easy task. In the first place, the record before us contains no document purporting to be an order for the shirts and cardigans (No. 100 —the Longuer order). As to the Alcides order, we face two sets of somewhat inconsistent documents, both of which Lawrence sent to the manufacturer: two unnumbered papers dated November 5, and 6, 1962, labelled "order placed by Cavendish Co."—apparently an intermediary for Lawrence; and three papers dated November 13, 1962, labelled "stock sheet", and bearing numbers 101, 102, and 103. Though the earlier set is the only one bearing the label "order", there is evidence both external and internal that it was superseded by the latter: a reference in a letter from Lawrence's representative that he had to create orders to match the numbers in the letters of credit; a reference in another letter to asterisks in the orders—which are found only in the "stock sheets", not in the "orders"; additional documentary requirements in the "stock sheets" not found in the "orders"; and a major change in half the sizes specified in one "order", from "small" to "medium". We cite such minutiae because of the difficulty of interpretation created by Lawrence and because of the assertion of appellee's counsel at trial that the inspecting agency could not determine what the orders were. Leaving aside consideration of what might be the legal effect of a buyer-created impossibility of clear identification of orders where a letter of credit required a certificate of conformity to order, we simply observe here that close scrutiny of the two sets of papers reveals that the "stock sheets" supplanted the earlier "orders".

In any event the most important notation found on the "stock sheets"—and not on the "orders"—was "Coats [and jackets] to be as sample inspected in Spain. Letter of credit to be cashed by presentation of bill of lading and

signature of superintendent or local inspection (buyers preference) (will confirm)."

The amendment to the letters of credit—appointing Supervigilancia the inspecting agent—was accepted by the major manufacturer involved—Alcides (and presumably Longeur)—on March 12, 1963 on which date both manufacturers requested Supervigilancia to begin inspection. State Street notified Lawrence on March 13.

Then began a barrage of cabled messages from Lawrence to both Supervigilancia and the manufacturers, which was to endure for two weeks. On March 13 Supervigilancia was asked, without explanation, to delay inspection until further instructions from Lawrence. On March 14, it was told that Lawrence had cabled the manufacturers to postpone shipment to permit Supervigilancia to inspect according to samples "they air mailing you directly". On the same day another cable was sent to Supervigilancia saying that Lawrence was airmailing "our approved samples per order and instructions". On the next day Supervigilancia was told to obtain three complete sets of samples properly marked from each concern, send two to Lawrence, and await instructions. On March 18 this message was repeated.

After these two conflicting sets of instructions, Supervigilancia, on March 23, cabled Lawrence, saying in effect that it was going ahead, acting "according your own indications on credits and orders". To this Lawrence replied on March 25 that Supervigilancia should "withhold certificate until after arrival and inspection of goods by your New York correspondent. . . ." This, if we read it aright, is a third position taken by Lawrence. At this point in time the latest date for completion of the bills of lading was five days away, March 31, with no alternative shipping date available within that period.

Supervigilancia, on March 26, executed its two certificates of inspection. It divided each certificate into two

parts. The first part tended to the matter at hand saying that (1) it had carried out its inspection

> ". . . basing ourselves on the details shown in the orders or Stock-sheets Nos. [100], 101, 102 and 103 . . . and in the samples that were handed to us by the Requirer [Alcides and Longuer], that corresponded, according to his sayings ratified in presence of a Public Notary, to the samples seen and approved by the Delegate of Firm ROBERT LAWRENCE INC, during his stay in Barcelona, and with [sic] are mentioned in the notes appearing in orders Stock-sheets Nos. [100], 101, 102 and 103, where there is a note reading:
>
> 'COATS or JACKETS [Germents (sic)]
> TO BE AS SAMPLE INSPECTED IN SPAIN' ";

that (2) the letters of credit required it to certify "THAT THE GOODS ARE IN CONFORMITY WITH THE ORDER"; that (3) a ten per cent random sample had been taken; and that (4) the "whole . . . [was] found conforming to the conditions estipulated [sic] on the Order-Stock-sheets."

The second part of each certificate contained a chronological account of the cabled messages we have summarized, followed by this language: "Requirer . . . is formally requiring us for delivering this certificate what we are doing today under reserves, not as far as the goods are concerned, which correspond to the samples seen and produced referred to at the beginning of this certificate, but to the existing difference between both interested parties as per the quoted cables."

All documents were presented to Banco Espanol, which honored them and made payment or the equivalent on March 28 and 29. On April 3 State Street cabled its refusal to accept the drafts on it "because accompanying inspection certificates non conforming with terms of credits which require certificates certifying goods are in conformity with the orders". A later letter amplified its position by specify-

ing that the certificates merely indicated conformity to samples alleged by the seller to "correspond" to other samples allegedly approved by the buyer and that the certificates were issued "under reserves".

The district court sustained this position, referring to the requirement that documents strictly conform to letter of credit provisions, and pointing out that each certificate failed in three respects: (1) that it merely certified that the goods conformed to "conditions"—which left it unclear if the conformity was to the whole of the order or only part; (2) that there was a doubt whether the "order-stock-sheet" was different from the order; and (3) that the certificate was confined to samples handed to the inspecting agency by a representative of the manufacturer. The court concluded that ". . . this was not the unqualified certificate required by the letter of credit and defendant bank was justified in its refusal to accept it."

We do not agree. Since, in our view, the third alleged defect noted by the court presents the most difficult problem, we shall deal with it first.

We note, at the outset, that an issuing bank's duty to honor a demand for payment is, to some extent, determined by statute. The Uniform Commercial Code, Mass. Gen. Laws ch. 106, § 5-114(1) (1958), provides, in relevant part, that "An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary."[1] This Code

[1] The district court noted that

"Both parties appear to agree that the case is governed by the Uniform Commercial Code as enacted in Massachusetts. Plaintiff [appellant] also relies upon the Uniform Customs and Practice for Documentary Credits issued by the International Chamber of Commerce, particularly Article 8 thereof. This, however, in substance states only what is contained in the Uniform Commercial Code."

provision, however, simply codifies long-standing decisional law and does not assist us here in determining whether the inspection certificate submitted by Supervigilancia complied with the terms of the credit.

We take as a starting point the substantial body of case law which establishes and supports the general rule that documents submitted incident to a letter of credit are to be strictly construed.[2] This is because international financial transactions rest upon the accuracy of documents rather than on the condition of the goods they represent. But we note some leaven in the loaf of strict construction. Not only does *haec verba* not control absolutely, *see, e.g., O'Meara* v. *National Park Bank,* 239 N.Y. 386 (1925), but some courts now cast their eyes on a wider scene than a single document.[3] We are mindful, also, of the admonition of several legal scholars that the integrity of international transactions (i.e., rigid adherence to material matters) must somehow strike a balance with the requirement of their fluidity (i.e., a reasonable flexibility as to ancillary matters) if the objective of increased dealings to the mutual satisfaction of all interested parties is to be enhanced.[4]

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[2] *See Moss* v. *Old Colony Trust Co.,* 246 Mass. 139, 152 (1923) and cases collected in n. 5, *infra.*

[3] For example, we observe that a leading authority standing for confining scrutiny to a single document, *J. H. Rayner & Co.* v. *Hambro's Bank, Ltd.,* [1943] 1 K.B. 37, seems to have mellowed to a disposition to look at the several documents presented to the negotiating bank as a whole. *Midland Bank, Ltd.* v. *Seymour,* [1955] 2 Lloyd's List L.R. 147 (Q.B.). *See Miller, Problems & Patterns of the Letter of Credit,* 1959 U. of Ill. L. F. 162 at 170, n. 45.

[4] This approach is entirely consistent with Mass. Gen. Laws ch. 106. The Uniform Commercial Code Comment to § 5-102(3) refers to the Code's canon of "liberal interpretation to promote underlying purposes and policies" (§ 1-102 (1) and (2)), and states, with respect to it, that "Since the law of letters of credit is still developing, conscious use of that canon and attention to fundamental theory by the court are peculiarly appropriate."

See, e.g., Mentschicoff, *How to Handle Letters of Credit*, 19 Bus. Lawyer 107, 111 (1963). Finally, we recognize that this is not a litigation about the nomenclature of goods. Consequently, we are not measurably helped by such cases as those cited in the margin which turn on discrepancies between the actual terms of invoices or bills of lading and requirements of a letter of credit.[5]

What we face here is a matter of procedure which can, in the first instance, be structured by the purchasing party. How may a buyer in the international market place be assured before payment that his purchase as delivered is of the quality agreed upon by the parties? As buyers become more concerned about quality, this issue is likely to become more important. That there are so few cases or comments addressed to the issue of reasonable pre-

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[5] *Filley* v. *Pope*, 115 U.S. 213 (1885) (shipment from Leith v. shipment from Glasgow); *Caloric Stove Corp.* v. *Chemical Bank & Trust Co.*, 205 F. 2d 492 (2d Cir. 1953) (steel v. cold rolled prime steel sheets); *Crocker First Nat'l Bank of San Francisco* v. *DeSousa*, 27 F. 2d 462 (9th Cir. 1928) (Java sugar v. Java refined sugar); *Wells Fargo Nevada Nat'l Bank of San Francisco* v. *Corn Exchange Nat'l Bank*, 23 F. 2d 1 (7th Cir. 1927) (invoice v. invoice with accompanying bill of lading and Java weight certificates); *Kaisha* v. *J. Aron & Co.*, 16 F. 2d 185 (2d Cir. 1926) ("Dallas to East Rochester" v. "f.o.b. . . . Pacific Coast"); *International Banking Corp.* v. *Irving Nat'l Bank*, 283 F. 103 (2d Cir. 1922) (". . . striped Fuji silk . . . as per your sample 400. . . ." v. ". . . made as per our designs and total width of stripes not more than 50% of the material width."); *Banco Nacional Ultramarino* v. *First Nat'l Bank of Boston*, 289 F. 169 (D. Mass. 1923) (white crystal sugar v. Brazil white crystal sugar); *Brown, Graves & Co.* v. *Ambler*, 66 Md. 391 (1887) (yellow pine lumber v. yellow pine flooring); *Bank of Italy* v. *Merchants Nat'l Bank*, 236 N. Y. 106 (1923) (raisins v. dried grapes); *Lamborn* v. *Lake Shore Banking & Trust Co.*, 231 N. Y. 616 (1921) (Java white sugar v. Java white granulated sugar); *National City Bank* v. *Seattle Nat'l Bank*, 121 Wash. 476 (1922) (granulated white sugar, no. 24 v. standard white granulated sugar); *J. H. Rayner & Co.* v. *Hambro's Bank, Ltd.*, [1943] 1 K.B. 37 (". . . machine-shelled groundnut kernels" v. "Coromandel groundnuts"); *Bank Melli Iran* v. *Barclays Bank*, 2 T.L.R. 1057 (1951) (goods "new" v. "100 new, good . . . .").

cautions to assure quality is indicative of the relatively novel status of the problem, at least so far as courts have dealt with it. We are mindful of the testimony in this case that an official of appellee, a busy bank, engaged in passing upon the issuance of 1,500 to 2,000 letters of credit a year for several decades, has encountered in this case his first experience with a letter of credit calling for a certificate of conformity to the order.

What are the realities of such a requirement on the part of the buyer? It is not enough that he receive the quantity of goods he ordered, nor that he receive goods capable of standard measure or grade. He must also, in such a case as this, receive them cut, tailored, sewn according to a style he has in mind. He must therefore rely on a sample he has seen and liked. Being in a distant part of the globe, the buyer must usually elect one of two alternatives. He may be present during the inspection process to verify the sample or he may select, with his seller's acquiescence, a person or firm in whom he has confidence to represent him. Unless he elects to be present, he is acting on faith—faith that the representative is capable and honest, and faith that the representative has the right samples or criteria to serve as a standard. Even if he mails an approved sample direct to the representative, he must rely on the integrity of the mails.

This act of faith—or its converse, the risk that merchandise will not turn out as hoped—is that of the buyer. As one contemporary student has written,

> ". . . there is one risk against which protection is required and which is less easy to guard against. That is the risk that the goods shipped may not comply with the terms of the sales contract as to quality. This is a **risk which normally the buyer will have to bear . . . but . . .** [he] can guard against the risk by requiring in his letter of request to the bankers that, in addition to the usual shipping documents, the vendor shall deliver a

certificate of quality, showing the goods to be as specified in the contract, signed by some responsible person at the place of shipment. The only risk then left to the buyer is that the person nominated to give the certificate may fail in his duty. But an entire absence of risk would mean an absence of business." A. G. Davis, *The Law Relating to Commercial Letters of Credit*, 3d ed., London, Sir Isaac Pitman & Sons Ltd., 1963, p. 19.

Or, in the words of other scholars,

"The requirement of such other documents, and particularly certificates of analysis, quality, weight, and the like, is a reasonable precaution for a prudent buyer to take, since he may in this way obtain some measure of assurance that the merchandise is as ordered. . . . The bank is under no obligation and bears no responsibility for the accuracy of any such representations and certificates. Nevertheless, through selection of a reputable third party, the buyer does have a degree of assurance that the merchandise is as represented." Ward and Harfield, *Bank Credits and Acceptances*, 4th ed., Ronald Press, 1958, p. 45.

These observations go to the heart of this case. For the buyer here—Lawrence—was striving to assure the delivery of quality goods. To be sure, it deliberately postponed the problem when it caused the letters of credit to be issued without resolving the question of the inspecting agent. Then it naively sought to have the sellers accept one of its own representatives. It had long since sewn the seeds of dispute by sending to the sellers both "stock sheets" which were really orders and "orders" which were merely preliminary papers. When it finally reached agreement with the seller as to an inspecting agency, it neglected to specify precisely how it would conduct the inspection operation, leaving only the bland instruction that the goods must conform to orders. And, so far as the inspecting agency was concerned, the orders merely referred to samples that might very well have been inspected in Spain at some past time.

Consequently, when faced on the eve of the shipping deadline both with a barrage of contradictory telegrams from the buyer and with samples which the sellers under oath stated "corresponded" with samples approved earlier by the buyer's representative in Barcelona, Supervigilancia had to act to the dissatisfaction of one of the parties to the basic contract. That it took the word, under oath, of the seller as to the appropriateness of the sample is no more than any inspector must ordinarily do. Unless the buyer is physically present (and Lawrence presumably could have arranged this during the frenetic two week period of cable traffic), the inspector must take someone's word that he is judging by the proper samples.

Even in the well known case of *O'Meara* v. *National Park Bank*, 239 N.Y. 386 (1925), a letter of credit calling for newsprint to "test 11/12-32 pounds" was held to be satisfied by an affidavit that annexed samples "stated [by the affiant] to be representative of the shipment" met the prescribed test. We fail to see how this is any more reliable than the affidavit of "correspondence" in the instant case.

In *Basse & Selve* v. *Bank of Australasia*, 90 L.T.R. (n.s.) 618 (K.B. 1904), the letter of credit covering a purchase of cobalt ore called for a certificate of analysis of a local chemist showing at least five per cent protoxide. The shipper (bent on delivering worthless ore) gave the chemist a packet of ore for analysis. The chemist furnished a certificate that the ore he examined contained the requisite amount of protoxide. But the negotiating bank refused to pay since there was nothing to indicate that the ore examined was that described in the bill of lading. The unscrupulous shipper then gave the chemist a packet of ore marked as was the bill of lading, "P.M. 2680 bags representing 100 tons". The chemist then referred in his certificate to "The sample of cobalt ore marked 'P.M. 2680

bags representing 100 tons' received from you. . . ." The bank paid the shipper and prevailed in a suit against it by its customer to recover the sum so paid. The court said:

> "It is said that [the certificate] professes to show merely the test of the contents of a sample packet with a mark upon it, and does not purport to show a test of the bill of lading of 100 tons of ore. This, I think, is a fanciful objection. Large quantities of produce are necessarily tested by means of samples. Such samples are drawn either by the servants of the owner of the goods or (as it seems) by the servants of the analyst, and if the samples are carefully and skilfully drawn they generally fairly represent the bulk. But in this case it would be no part of the bank's duty to see to the sampling or to ascertain that it was fairly done." 90 L.T.R. (n.s.) at 620.

So we say in this case that, while the sample may be just as misleading as the ore sample in *Basse & Selve,* the advising bank was equally justified in paying on the strength of the documents.

We see no significant difference in Supervigilancia being told by the manufacturers that the samples were those approved by the buyer and being told that they "corresponded" to such samples. Webster's Dictionary (3d Int'l ed.) gives such meanings of "correspond" as "in agreement", "conformity", "equivalent", "match", "equal". In the context and considering the language difficulty, we think these meanings apply more than the looser ones like "analogous", "parallel", or "similar". In effect, Lawrence in this case, by providing as a referent to the letter of credit requirement of conformity to orders merely the early cryptic description on the stock sheets ("Coats . . . to be as samples inspected in Spain"), procured no more reliable assurance of authenticity than the credit termination clause in *Fair Pavilions, Inc.* v. *First Nat'l City Bank,* 264 N.Y.S. 2d 255 (App. Div. 1965), which was to be triggered

". . . if our Travelers Letter of Credit Department receives . . . from an officer (or one describing himself therein as an officer) of [bank's customer] an affidavit that one or more . . . events . . . has occurred." 264 N.Y.S. 2d at 256.

Moreover, if there be ambiguity surrounding the words "correspond" or "sample approved in Spain" we would, like the court in *Fair Pavilions,* ". . . take the words as strongly against the issuer as a reasonable reading will justify. . . ." *Supra* at 258.

To hold otherwise—that a buyer could frustrate an international transaction on the eve of fulfillment by a challenge to authenticity of sample—would make vulnerable many such arrangements where third parties are vested by buyers with inspection responsibilities but where, apart from their own competence and integrity, there is no ironclad guarantee of the sample itself.[6]

As for the argument that Supervigilancia's finding that the goods conform "to the conditions estipulated on the Order-Stock-sheets" is a meaningful variance from the terms of the letters of credit, we confess to semantic myopia. "The conditions" mean, as we read the certificates, all the conditions, hence the order itself. As for the dual use by the agency of the words "Order-Stock-sheets", we have already indicated both the nature and cause of the confusion and conclude that Supervigilancia acted solo-

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[6] This would also in effect undermine the letter of credit device and make the negotiating bank a judge between claims of vendor and vendee. If an issuing bank at the behest of a vendee ". . . is not obliged to assume the burdens of a controversy between the vendor and vendee", *Laudisi* v. *American Nat'l Bank,* 239 N. Y. 234, 243 (1924), a fortiori we think a negotiating bank should be spared the ordeal. For, after all, it is "the purchasing bank . . . [which knows] nothing of the buyer and perhaps nothing of the seller, [and] acts entirely in reliance on the credit of the issuing bank." *Continental Nat'l Bank* v. *National City Bank,* 69 F. 2d 312, 316 (9th Cir. 1934).

monically in borrowing the substance of the stock sheets and the label of the "orders". We do not see how it could have done otherwise.

The remaining contention that "under reserves" has some mysterious meaning which infects the entire certificate is not borne out by the inapposite cases cited to us and is directly refuted by the limiting language immediately following—"not as far as the goods are concerned". Further reading of the document indicates clearly that the phrase was directed to the underlying dispute between buyer and seller, which could not be the concern of the advising bank.

We hold, therefore, that the inspection certificate in this case conformed in all significant respects to the requirements of the letter of credit.

Appellee has urged that, in the event we might reverse the district court's judgment, the case should be remanded for a new trial or at least further findings, since the district court did not find it necessary to reach additional defenses. Appellant urges otherwise. It is not clear to us which is correct. We reverse the judgment of the District Court and remand for such further proceedings, consistent with this opinion, as the court feels appropriate. We do say that these additional defenses were not argued before us, nor directly passed upon, but whether this is chargeable to appellee, so that judgment should be entered for appellant forthwith, we leave to the district judge before whom this case was originally heard.

On the same day, November 7, 1967, the following judgment was entered in each case:

JUDGMENT

November 7, 1967

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated and the case is remanded to that Court for further proceedings consistent with the opinion filed today.

By the Court:
ROGER A. STINCHFIELD, *Clerk.*

By: /s/ DANA H. GALLUP
Chief Deputy Clerk.

Enter:
/s/ ALDRICH, Ch.J.

Thereafter, on November 29, 1967, the following order was entered in each case:

ORDER OF COURT

November 29, 1967.

It is ordered that the petition for rehearing filed November 21, 1967, be, and the same hereby is, denied.

By the Court:
ROGER A. STINCHFIELD, *Clerk.*

By: /s/ DANA H. GALLUP
Chief Deputy Clerk.

APPENDIX C

MASSACHUSETTS GENERAL LAWS c. 106

§ 5-109. Issuer's Obligations to Its Customer

(1) An issuer's obligation to its customer includes good faith and observance of any general banking usage but unless otherwise agreed does not include liability or responsibility

(a) for performance of the underlying contract for sale or other transaction between the customer and the beneficiary; or

(b) for any act or omission of any person other than itself or its own branch or for loss or destruction of a draft, demand or document in transit or in the possession of others; or

(c) based on knowledge or lack of knowledge of any usage of any particular trade.

(2) An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit but unless otherwise agreed assumes no liability or responsibility for the genuineness, falsification or effect of any document which appears on such examination to be regular on its face.

* * *

§ 5-112. Time allowed for Honor or Rejection; Withholding Honor or Rejection by Consent; "Presenter"

(1) A bank to which a documentary draft or demand for payment is presented under a credit may without dishonor of the draft, demand or credit

(a) defer honor until the close of the third banking day following receipt of the documents; and

(b) further defer honor if the presenter has expressly or impliedly consented thereto.

Failure to honor within the time here specified constitutes dishonor of the draft or demand and of the credit.

* * *

§ 5-114. Issuer's Duty and Privilege to Honor; Right to Reimbursement

(1) An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary. The issuer is not excused from honor of such a draft or demand by reason of an additional general term that all documents must be satisfactory to the issuer, but an issuer may require that specified particular documents must be satisfactory to it.

(2) Unless otherwise agreed when documents appear on their face to comply with the terms of a credit but a required document does not in fact conform to the warranties made on negotiation or transfer of a document of title (section 7-507) or of a security (section 8-306) or is forged or fraudulent or there is fraud in the transaction

(a) the issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and under circumstances which would make it a holder in due course (section 3-302) and in an appropriate case would make it a person to whom a document of title has been duly negotiated (Section 7-502) or a bona fide purchaser of a security (section 8-302); and

(b) in all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face of the documents but a court of appropriate jurisdiction may enjoin such honor.

APPENDIX D

CERTIFICADO DE INSPECCION

N.° 9614.
TELEGRAMAS: SUPERVISE

PRIMER ORIGINAL

BARCELONA
Vía Layetana, 20
Teléfono 221 40 67
(3 LINEAS)

"SUPERVIGILANCIA"

FB-VF/.

SOCIEDAD GENERAL DE CONTROL, S. A.

WE HEREBY CERTIFY : That on March 12th.1963, and with a view to comply with conditions stipulated in the irrevocable Bank credit nº 5125/35636 opened by the State Street Bank and Trust Company, Boston 1, Mass.USA, the Firm MANUFACTURAS ALCIDES S.L.- Barcelona, did require us , to carry out the inspection and ascertainment of :

5.500 - RAINCOATS.
6.000 - BEACH JACKETS.

destined to the orderer of said credit, Firm ROBERT LAWRENCE INC., Boston, Massachusetts.
That we have effected the inspection and ascertainment of the merchandise, basing ourselves on the details shown in the orders or Stock-sheets Nos. 101, 102 and 103, dated November 5th. 6th and 13th November 1962 and in the samples that were handed to us by the Requirer, that corresponded, according to his sayings ratified in presence of a Public Notary, to the samples seen and approved by the Delegate of Firm ROBERT LAWRENCE INC, during his stay in Barcelona, and with are mentioned in the notes appearing in orders Stock-sheets Nos. 101,102 and 103, where there is a note reading :

"COATS or JACQUETS TO BE AS SAMPLE INSPECTED IN SPAIN"

owing that at time of being required and to carry out the inspection, we had no more indications than those shown on aforesaid Bank credit, which as regards our intervention is textually reading so :

"INSPECTION CERTIFICATE MUST BE ISSUED BY SUPERVIGILANCIA SOCIEDAD GENERAL DE CONTROL SA BARCELONA CERTIFYING THAT THE GOODS ARE IN CONFORMITY WITH THE ORDER.."

The checking of the goods have been carried out on basis of trials, taking at random approximately 10% of the goods ready for this shipment, having obtained the following outturn :

RAINCOATS : 5.500 Mens Cotton Raincoats
Style : BARCELONA made out in cloth quality ROSAS
" PALOS " " " " " " ECUADOR
" GRANADA " " " " " " ECUADOR
and Black and Tan Coloura.
BEACH JACKETS : 6.000 Mens Terry Beach Jackets
Style : DANSE, one colorway - OLE, one colorway - ESCARCHA in yellow, red, blue and white colours.

the whole, at the moment of the inspection, being found conforming to the conditions estipulated on the Order-Stock-sheets.
Goods remained packed and ready for shipment as follows :
Cases marks : CAVENDISH CO./NEW YORK
Raincoats : 60 cases Nos. 81/104 122/126 140/170.
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APPENDIX D

CERTIFICADO DE INSPECCION

N.° 9614.
TELEGRAMAS:
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BARCELONA
Via Layetana, 20
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(3 LINEAS)

"SUPERVIGILANCIA"

-second page-

FN-VF/.

SOCIEDAD GENERAL DE CONTRÓL, S. A.

"BEHALF ROBERT LAWRENCE COMPANY ABSTAIN INSPECTION 5500 RAINCOATS 6500 BEACHJACKETS SUPPLIERS ALCIDES 2000 KNIDSHIRTS LONGUER UNTIL YOU RECEIVE ROBERT LAWRENCE INSTRUCTIONS".

which was duly communicated to our Requirer, as well as those that were received again relating to the matter, and reading :

Dated New York March 14, 1963.

"ROBERT LAWRENCE TODAY CABLING SUPPLIERS INSISTING POSTPONEMENT SHIPMENT LATERDATE INORDER PERMIT YOUR INSPECTION ACCORDING SAMPLES THEY AIRMAILING YOU DIRECTLY".

Dated New York March 14, 1963.

"FOLLOWING CABLE SENT TODAY ALCIDES AND LONGUER INSIST POSTPONEMENT SHIPMENT LATER DATE IN ORDER PERMIT SUPERVIGILANCIA INSPECT ACCORDING OUR APPROVED SAMPLES PER ORDER AND INSTRUCTIONS WE AIRMAILING TODAY COMA ANY EARLIER SHIPMENTS ATTEMPTED UNDER YOUR OWN RESPONSIBILITY IS SUBJECT TO REFUSAL CABLE IMMEDIATELY WHEN NEXT STEAMER SAILLING SO EXTENSION OF CREDIT CAN BE ARRANGED."

Dated Boston March 15, 1963.

"OUR INSPECTION DEPARTMENT HAS REGECTED ALCIDES AND LONGUER SAMPLES NOT BEING ACCORDING SPECIFICATIONS OF ORDERS STOP PLEASE OBTAIN THREE COMPLETE SETS OF SAMPLES PROPERLY MARKED FROM EACH CONCERN STOP KEEP ONE COMPLETE SET EACH YOUR OFFICE AIRFREIGHT IMMEDIATELY TWO COMPLETE SETS EACH YOUR NEW YORK OFFICE OUR ATTENTION STOP UPON RECEIPT AND EXAMINATION YOUR NEW YORK OFFICE WILL IMMEDIATELY INSTRUCT FURTHER".

Dated New York, March 18, 1963.

"UNDERSTAND FROM YOUR NEWYORK CORRESPONDENT THAT YOU INSIST ISSUING CERTIFICATE BASIS SHIPPERS TYPE SAMPLE WHICH NOT IN ACCORDANCE CONTRACT STOP INSIST YOU BASE INSPECTION ON SAMPLES APPROVED BY US AS PER CONDITION OF ORDER AND REQUEST YOU EXPEDITE SHIPMENT OF SAMPLES TO US CARE YOUR NEWYORK OFFICE RESERVING ONE COMPLETE SET FOR BASIS ACTUAL INSPECTION AFTER OUR APPROVAL STOP WILL HOLD YOU DIRECTLY RESPONSIBLE FOR ALL CONSEQUENCES IF INSPECTION CERTIFICATE ISSUED UNDER ANY OTHER CIRCUMSTANCES STOP AMENDED LETTER OF CREDIT SPECIFICALLY REQUIREES INSPECTION CERTIFICATE TO BE ISSUED ONLY IF MERCHANDISE FOUND TO CONFORM WITH ORDER WHICH SPECIFICALLY REQUIRES US TO APPROVE SAMPLE PRIOR TO ACTUAL INSPECTION STOP INSPECTION MUST BE BASES ON SAMPLES APPROVED BY US STOP UNTIL WE CONFIRM TO YOU THAT SAMPLES ARE APPROVED YOU HAVE NO BASIS FOR ISSUING CERTIFICATE OF INSPECTION AND DO SO AT YOUR PERIL."

That on March 23rd. we sent to said firm ROBERT LAWRENCE INC.-Boston, the following cable :

"REFERRING YOUR CABLES 14th 15th 18th INSTANT MISING YOUR DIRECT INSTRUCTIONS PRIOR STARING INSPECTION HAVE ACTED ACCORDING YOUR OWN INDICATIONS ON CREDITS AND ORDERS CONSEQUENTLY REJECTING WHICHEVER RESPONSIBILITY."

To which we received on today's date, 26 March, the following reply, dated at Boston on March 25th. 11'32A, which has been immediately passed on to Firm MANUFACTURAS ALCIDES SA., and that cable reads as follows :

"YOURS OF MARCH 23 STRENUOUSLY OBJECT YOUR ISSUANCE INSPECTION

...//...

Nuestra intervención, a la cual este certificado se refiere, ha sido llevado á cabo según nuestro más leal saber y entender, pero sin ninguna responsabilidad para nuestra firma, ya que nuestro compromiso está limitado a la ejecución de nuestro cometido con las precauciones o cuidados habituales.— Al aceptar este certificado, los vendedores reconocen que la emisión de este documento no les exime de sus obligaciones contractuales.

APPENDIX D

CERTIFICADO DE INSPECCION

N.° 9614.
TELEGRAMAS:
SUPERVISE

PRIMER ORIGINAL

BARCELONA
Via Layetana, 20
Teléfono 221 40 67
(3 LINEAS)

"SUPERVIGILANCIA"

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SOCIEDAD GENERAL DE CONTROL, S. A.

"CERTIFICATE WITHOUT JTRICT COMPLIANCE TERMS OF AMENDED CREDIT WHICH REQUIRES AS PER AMENDMENT AT OUR REQUEST YOUR FINDING GOODS CONFORMS ORDERS STOP ORDER SPECIFICALLY PROVIDES FTR INSPECTION AGAINST TYPE SAMPLES FIRS APPROVED BY US WHICH APPROVAL NOT GIVEN REFER OUR CABLE MARCH 15 SUGGEST YOU WITHHOLD CERTIFICATE UNTIL AFTER ARRIVAL AND INSPECTION OF GOODS BY YOUR NEW YORK CORRESPONDENT OTHERWISE BY ISSUANCE OF CERTIFICATE WITHOUT COMPARING APPROVED SAMPLES WE WILL HOLD SUPERINTENDENTS RESPONSIBLE FOR ANY LOSS COST OR DAMAGES SUSTAINED BY US-ROBERT LAWRENCE INC.

To which notifications we received a reply of the required Firm Manufacturas Alcides S.L., communicating us that in view of the fact that they had not any othe r shipping date available than the one foreseen and taking into consideration that the top date for shipment shown in the Bank credit is March 31st.1963, they were at a loss to agree to the request emanating from Firm ROBERT LAWRENCE INC. and it were ratified that we should pursue our ascertainments and follow strictly the conditions of aforesaid Bank credit no.4125/35636. That the Requirer having loaded the merchandise and being already in his possession the bills of landing together with the further documents necessary to be delivered to the Bank, holder of the aforesaid Bank-credit, he is formally requiring us for delivering this certificate what we are doing today under reserves, not as far as the goods are concerned, which correspond to the samples seen and produced referred to at the begining of this certificate, but to the existing different between both interested parties as per the quoted cables.
The whole is stated thereby, understanding that we reject whichever responsibility that from it might arise, leaving at the opinion of the Bank who is holding the above mentioned credit, the liberty to take the dispositions it may consider opportune or necessary in view of the existing discrepancies between the irrevocable Bank credit and the cables received which shall have to be settled between parties concerned inasmuch as the issuan ce of the present certificate is based on the aforesaid Bank credit and limited to give an account of the outturn of our actuation, but we repeat without our being in a position to assume any responsibility for contractual differences that may exist between Vendors and Buyers.
And To Whom It May Concern, We sign the present Certificate at Barcelona, in three specimens and to a sole effect, on March twenty-sixth nineteenhundred and sixty three.

SUPERVIGILANCIA
Sociedad General de Control, S. A.

26 FEB 1963

26 MAR 1963

Nuestra intervención, a la cual este certificado se refiere, ha sido llevado a cabo según nuestro más leal saber y entender, pero sin ninguna responsabilidad para nuestra firma, ya que nuestro compromiso está limitado a la ejecución de nuestro cometido con las precauciones o cuidados habituales.— Al aceptar este certificado, los vendedores reconocen que la emisión de este documento no les exime de sus obligaciones contractuales.

APPENDIX E

CERTIFICADO DE INSPECCION

ADDENDUM TO INSPECTION CERTIFICATE Nr.9.614

N.°

TELEGRAMAS: SUPERVISE

BARCELONA
Via Layetana, 20
Teléfono 221 40 67
(3 LINEAS)

"SUPERVIGILANCIA"

SOCIEDAD GENERAL DE CONTROL, S. A.

M-14-596
Jan

In pursuance to our certification issued on the twenty-sixth March nineteenhundred and sixty three, relating to the irrevocable credit number 4.125/35636 of the State Street Bank and Trust Co., Boston, and as addendum to the same, of which it becomes a part, we are stating and certifying hereby that, in order that certificate complies with the purposes foreseen in the referred Letter of Credit, it must be taken into consideration only and exclusively the part of its text comprised from its starting up to ....."BEACH JACKETS 142 CASES NUMBERS 1/80, 105/, 121, 127/139, 171/182". And the remaining of the text of the certification, that is to say from the sentence " WE HAVE TO POINT OUT THAT ONCE OUR INTERVENTION HAD STARTED..." until arriving at the end of the penultimate paragraph that ends with the words...." THAT MAY EXIST BETWEEN VENDORS AND BUYERS", was included with a view solely that since this Superintending Service was unaware of the clauses and contractual terms from which the aforesaid Letter of Credit is derivating, to decline the responsibility that might be attributed to us for keeping silence on the incidents or antecedents transcribed in that part of the certificate, by being invocated such a silence by any one of the parts against the other, in an eventual dispute or discussion that might arise between them, derivating from the clauses unknown by this Superintending Service.

And To Whom It May Concern, we sign the present Addendum at Barcelona, in three specimens and to a sole effect, on April twenty-fifth nineteenhundred and sixty three.-

"SUPERVIGILANCIA" Sociedad General de Control, S. A. Via Layetana 20, 3.º 2.ª BARCELONA

SUPERVIGILANCIA
Sociedad General de Control, S.A.
Gerente

25 ABR 1963

1963

Nuestra intervención, a la cual este certificado se refiere, ha sido llevado a cabo según nuestro más leal saber y entender, pero sin ninguna responsabilidad para nuestra firma, ya que nuestro compromiso está limitado a la ejecución de nuestro cometido con las precauciones o cuidados habituales.- Al aceptar este certificado, los vendedores reconocen que la emisión de este documento no les exime de sus obligaciones contractuales.

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In the Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 1155.

STATE STREET BANK AND TRUST COMPANY,
Petitioner,

v.

BANCO ESPANOL DE CREDITO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Counter-Statement of Case.

Respondent objects to the statement of the case and the statement of questions presented in the petition for a writ of certiorari insofar as the petition states or implies that in rendering its decision the Court of Appeals departed from traditional principles of commercial law. The Court of Appeals in fact followed established principles, although in relation to unusual documents. In the course of its argument showing why there need be no further review of this case, respondent will correct the erroneous statements of petitioner concerning these matters.

Argument.

Within the meaning of Rule 19 of the Rules of this Court there are no reasons, special, important or otherwise, why

the decision of the Court of Appeals for the First Circuit in this case should be reviewed.

The record presents no question of general commercial interest. This case stands by itself. As stated in the petition for certiorari, the documents involved are "specific and unusual documents." (Footnote to p. 3 of petition).

The petition states that this case is of great importance because an international financial transaction is involved. (Petition, p. 11). This statement rests on the erroneous premise that the decision of the Court of Appeals in this case bears some significant relation to the letter of credit in the ordinary transaction. In fact, no such relation exists. The documents in this case were unique, and the significance of the case is limited to its facts. Within the memory of a senior official the State Street Bank and Trust Company has never issued letters of credit like the two in the case at bar, and there is no reason to suppose that any like them will be issued again.

An official of the petitioner testified that since coming to petitioner's foreign department in the year 1929 he had reviewed some 60,000 or 70,000 letters of credit and that he had never before seen any like the two letters of credit issued by petitioner in the case at bar. (R. 57-58). This testimony is printed in the appendix hereto.

In the trial court counsel for the petitioner said that the terms of the letters of credit issued by petitioner were "very unusual." (R. 59).

A further review of these unusual documents will add nothing significant to the jurisprudence.

On the merits, moreover, the decision of the Court of Appeals applied the right legal principles and was a correct decision.

In arriving at its decision with respect to the clumsily drafted letters of credit issued by petitioner in this case

the Court of Appeals applied doctrines of commercial law which are traditional and which have recently been codified in the Uniform Commercial Code.

The petition states in a number of places that the Court of Appeals departed from the traditional principle that the issuer of a letter of credit is a dealer in documents. (Petition, pp. 5, 12, 14, 17-20). This is not a correct statement. The opinion of the court below specifically referred to Section 5-114(1) of the Uniform Commercial Code, which is as follows:

> "An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary." (Petition, p. 33).

The opinion went on to note that the Uniform Commercial Code "simply codifies long-standing decisional law." (Petition, p. 34). The court said:

> "We take as a starting point the substantial body of case law which establishes and supports the general rule that documents submitted incident to a letter of credit are to be strictly construed." (Petition, p. 34).

These quotations show that the Court of Appeals was applying the basic legal principles traditionally applicable to letters of credit.

The difficulty from which arose the dispute adjudicated by the Court of Appeals was created by the letters of credit issued by the petitioner. The initial letters of credit embodied two sources of confusion. First of all, at the outset and over the objection expressed to its customer, the State Street Bank and Trust Company issued letters of credit

calling for "an inspection certificate," without designating any inspector or specifying any standard of inspection; this omission left a "hazardous gap" which required a delay of 3½ months to resolve. (Petition, pp. 28-29). An amendment to the letters of credit finally named an inspector, but established as a standard that the goods be "in conformity with the order." (Petition, p. 29). This was a second source of confusion, and it was this feature of the letters of credit which petitioner's own official had not seen in any of the prior 60,000 to 70,000 letters of credit which he had examined during his career. (R. 57-58).

The letters of credit in the case at bar fell short of the requirement mentioned in the footnote on page 17 of the petition for certiorari to the effect that the terms of such a letter should be "sharply defined." As stated by the Court of Appeals:

> "Identification of the underlying orders to which the letters of credit referred is not an easy task." (Petition, p. 30).

The confusion was the fault of petitioner State Street Bank and Trust Company. Contrary to explicit statements in the petition (page 10; footnote 25 on page 16) to the effect that the State Street had never seen the relevant "orders" and superseding "stock sheets," the State Street had these very papers in its file. (Ex. 3; R. 89, 93-95, 97-98). The State Street could have attached copies of these papers to its amended letters of credit or could otherwise have quoted or identified without ambiguity the specific provisions that were involved. It did not do so.

The Court of Appeals looked to evidence of facts bearing upon the meaning of the documents involved and showing the extent to which the State Street Bank and Trust Company had knowledge of such matters. Upon these facts the

Court of Appeals held (1) that the designated inspector acted correctly in construing the meaning of the letter of credit in relation to the papers labeled "order" and "stock sheets" that were placed before it (petition, p. 40); (2) that in the absence of instructions in the letter of credit the inspector had adopted an acceptable inspection procedure (petition, p. 38); (3) that the inspector correctly ignored a barrage of contradictory cablegrams from the disaffected buyer in the United States (petition, p. 38); (4) that the "reserves" referred to in the inspection certificate referred, as the inspection certificate expressly stated, not to the goods, but merely to the underlying dispute reflected in the barrage of cablegrams (petition, p. 41); and (5) that certain semantic problems arising in translation were without significance (petition, pp. 39-40).

The concluding portion of the reasoning of the Court of Appeals is in precise accordance with the traditional principles of commercial law with respect to letters of credit. The Court of Appeals said:

> "We hold, therefore, that the inspection certificate in this case conformed in all significant respects to the requirements of the letter of credit." (Petition, p. 41).

Thus the "specific and unusual documents" referred to in the petition itself (p. 3) were interpreted, and the resulting dispute decided, by the application of traditional legal principles.

It should be noted in closing that the broad arguments of public policy set forth at pages 17 through 20 of the petition fall wide of the mark in this case. The argument addressed to public policy suggests, for example, that before paying on a letter of credit an issuing bank will henceforth be obliged to make its decision "at prohibitive cost, under an unmeetable deadline, at the risk of complex liti-

gation . . ." (Petition, pp. 18-19). This rhetoric has no place in the case at bar, in which the refusal of the State Street Bank and Trust Company to honor the letters of credit was made upon the "instructions" of the Bank's customer and upon confirmation of an indemnification agreement made several weeks before. (PX. 6; R. 111). The earlier indemnification agreement by the customer was—

> "to undertake the defense of any suit that might be brought in the United States as a result of such refusal and we agree further to indemnify you for any loss, cost or damage which you may suffer which is referrable to such litigation." (PX. 7; R. 112-113).

Thus the State Street Bank and Trust Company is in this case not as a bank but as a nominee. It has not suffered any harm from being a bank. It is bringing the instant petition, as a service or in connection with a loan arrangement (R. 68), to assist its customer in refusing to pay for goods. Petitioner is therefore without standing in this case to complain of any supposed hardship which a banker might think he saw in the decision below.

No judgment has yet been entered in accordance with the mandate of the Court of Appeals calling upon the District Court to decide whether there are to be further proceedings or whether the absence of argument in the Court of Appeals with respect to "additional defenses" claimed by petitioner is to be charged to petitioner so that judgment shall be entered for respondent forthwith. This Court may consider the absence of a final judgment below as one additional reason why this Court should not exercise its discretion to review the unique situation presented in this case.

Conclusion.

For the above reasons the respondent asks that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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[Appendix follows.]

Appendix.

[39] ROBERT D. NORTON, Sworn

Direct Examination by Mr. Choate

Q. What is your name? A. Robert D. Norton.

Q. Where do you live? A. No. 83 Prescott Street, Reading, Massachusetts.

Q. You are employed by the State Street Bank and Trust Company? A. I am.

Q. In what capacity? A. I am an assistant vice-president assigned to the international department.

Q. How long have you held that position? A. Since 1955.

Q. How long have you been in the international department? A. I was originally employed by one of the predecessor institutions, the Second National Bank of Boston, in 1927, and I was assigned to the foreign department of that institution in 1929.

Q. From your employment in the foreign department of the predecessor bank and the State Street Bank and Trust Company, have you had occasion, during those years, to deal with letters of credit? [40] A. I have.

Q. About how many letters of credit would you say you deal with in the course of a year, or have dealt with in the course of a year? A. In the area of 1,500 or 2,000.

* * * * * * * * *

Q. Is the requirement for the inspection certificate that appears in the amendments of the letters of credit, in this case that the goods are in conformity with the order, is that the usual form of the requirement of an inspection certificate, in your practice in the bank? A. In my experience, it is not.

Q. What is the usual form of the requirement of an inspection certificate? A. In our experience frequently there is no further definition other than naming the individual or party who would issue the inspection certificate. Occasionally it might be further defined indicating that the inspection certificate must certify that the goods are in accordance with certain approved samples.

Q. Have you ever seen the requirement for inspection certificate in this particular form before, in your experience in the banking business? A. Not to my knowledge.

Q. When the first documents, the first set of documents—

The Court: What was that question?

Mr. Choate: I am saying that the language in which the inspection certicate is required is that the inspection certificate certify that the goods are in [42] conformity with the order. He has never seen that form of words used before, in his experience.

The Court: In the inspection certificate?

Mr. Choate: In the bill of lading.

The Court: What are those words?

Mr. Choate: They are in the amendment to the letter of credit.

The Court: Show it to me. What I am wondering about now is where Mr. Norton agreed to have that phrase put in there if he had never seen it before in any other letter of credit.

Mr. Choate: It is a very unusual requirement.

The Court: Who required it?

Q. Can you tell us how that particular language came to be in the amendment to the letter of credit? A. This amendment was requested by our customer, Robert Lawrence.